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Order 99-4-5



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 9th day of April, 1999

Served: April 9, 1999

Joint application of

**FINE AIR SERVICES CORP.
and
ARROW AIR, INC.**

Docket OST-99-5196

for an exemption from the provisions of 49 U.S.C.
41105

ORDER GRANTING EXEMPTION

Summary

By this order, we exempt Fine Air Services Corp. (Fine Corp.) and Arrow Air, Inc. (Arrow) from the provisions of section 41105 of Title 49 of the United States Code (the Statute), subject to certain conditions.

Background

On February 23, 1999, in accordance with the provisions of section 204.5 of our rules (14 CFR 204.5) that require air carriers to notify us of substantial changes affecting their operations, Fine Corp. and Arrow advised the Department that they had entered into an agreement whereby Fine Corp., the parent of the certificated air carrier Fine Air Services, Inc. (Fine Air), would acquire all of the outstanding stock of Arrow. The agreement also provided that Fine Corp. would acquire other assets, principally aircraft and parts, previously held by Arrow's parent. Fine Corp. stated that it had no plans to merge Arrow's operations with those of Fine Air and would continue to operate Arrow under the oversight of Arrow's current senior management.

Also on February 23, 1999, Fine Corp. and Arrow jointly filed an application in Docket OST-99-5140 seeking the Department's approval under section 41105 of the Statute of the *de facto* transfer¹ of the certificate and exemption authorities held by Arrow to Arrow under the ownership of Fine Corp.²

On March 4, 1999, Fine Corp. and Arrow jointly filed in Docket OST-99-5196 an application for an exemption from section 41105 to the extent necessary to allow Fine Corp. to complete its acquisition of Arrow pending the Department's action on the *de facto* transfer application. In support of this exemption request, the applicants state that upon consummation of the transaction, Fine Corp. will control both Fine Air and Arrow, but will operate each company independently and that grant of the exemption request would be consistent with the past practice of the Department. Further, the applicants state that, on March 1, 1999, they were notified that the required Hart-Scott-Rodino review period had been terminated and, hence, Fine Corp. and Arrow intend to consummate the purchase as soon as the Department allows.

In addition, the joint applicants requested that the Department shorten the answer period to their exemption application from 15 calendar days to four calendar days with answers due on March 8, 1999.³

By notice dated March 10, 1999, the Department shortened the answer period for the subject exemption request, although not to the extent requested by the applicants, making answers due by close of business March 12, with replies thereto due by noon on March 17.

¹ The Department has held that "[a] stock acquisition resulting in common control of two carriers having international route authority constitutes a *de facto* certificate transfer subject to section 401(h)." [Former section 401(h) of the Federal Aviation Act was recodified as section 41105 of the Statute.] *Federal Express Corporation and The Flying Tiger Line, Inc.*, Order 89-3-21, March 8, 1989, p. 2, note 2. Also see, *AMR Eagle, Inc. and Executive Air Charter, Inc.*, Order 90-2-1, January 24, 1990; and *Texas Air-TWA Acquisition Case*, Order 85-8-25, August 9, 1985, pp. 5-6.

² Arrow holds interstate scheduled passenger certificate authority, as well as foreign scheduled passenger certificate authority to serve various points in Europe, the Caribbean, Central America, and South America including Chile, Ecuador, Peru, etc. (Route 343F). However, the passenger authority contained in these certificates is not effective and the company currently is authorized to conduct all-cargo operations only. (See Order 95-6-39, served August 10, 1995.) Fine Air holds interstate and foreign charter all-cargo certificate authority and foreign scheduled all-cargo certificate authority to serve Santo Domingo, Dominican Republic, from Miami (Route 644). (See Order 97-7-30, served July 29, 1997.) Both Arrow and Fine Air are subject to advance notification and fitness redetermination requirements before they can expand their aircraft fleets beyond 12 for Arrow (by letter from the Director, Office of Aviation Analysis, dated September 10, 1998) and 20 for Fine Air (see Order 98-1-3, ordering paragraph 4). In addition to the certificate authority held, both Fine Air and Arrow hold exemption authority to serve other markets in Latin America. There are eighteen countries to which both Fine Air and Arrow hold either certificate or exemption authority to conduct scheduled all-cargo operations. These countries are Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay, and Venezuela.

³ The applicants indicated that they would be polling other carriers serving the limited entry or otherwise restricted scheduled markets to be transferred regarding this exemption request.

On March 11, 1999, an answer to the exemption application was received from Gemini Air Cargo.⁴ In its filing, Gemini states that while it has no objection to the Department's approval of the joint application as to any country that provides open entry to U.S. carriers, it wants the Department to make a positive determination that the requested route transfer will not present any problems with respect to the entry of another air carrier into each of the markets involved prior to approving the *de facto* transfer. Gemini notes that it is particularly concerned over the impact the transfer would have on the ability of other carriers to serve Colombia, Ecuador, and Venezuela.

With respect to Colombia, Gemini states that this is a limited entry market and that despite holding U.S. authority to do so, it has been unable to obtain authority from the Colombian government to operate to Colombia under a wet lease arrangement; therefore, the combination of Fine Air's Colombian charter and wet lease operations with Arrow's scheduled service to Colombia would be to the detriment of Gemini.

With respect to Ecuador, Gemini notes that this is a restricted entry market to which both Fine Air and Arrow hold authority, and, combined, will operate five out of eleven weekly frequencies, thus limiting the availability to other carriers.

Finally, with respect to Venezuela, Gemini notes that the Government of Venezuela has refused to grant it authority to operate charters to Venezuela,⁵ and, therefore, the Department should require that the Venezuelan authority of either Fine Air or Arrow be transferred to another carrier willing to use this authority and insist that the Venezuelan government respect that transfer.

On March 16, 1999, the joint applicants filed a consolidated reply to Gemini's answer. In this reply, Fine Corp. and Arrow state that Gemini has never made any serious attempt to apply for, much less operate, scheduled all-cargo service to any of the eighteen countries at issue in this proceeding. Further, the joint applicants state that Gemini has never held any scheduled all-cargo operating authority to any country in South and Central America or the Caribbean basin. The joint applicants also note that Fine Air and Arrow will not be operated as a single airline.

With respect to the ability of Gemini, or other U.S. carriers, to serve Colombia, the joint applicants note that the U.S.-Colombia situation is serious and has resulted in Fine Air being unable to utilize its scheduled service exemption authority. However, the joint applicants argue that Gemini's inability to obtain approval for a wet lease arrangement with Lineas Aereas Suramericanas, a Colombian carrier, should not constitute grounds for denying the proposed exemption request nor the underlying *de facto* transfer of Arrow's authority to Fine Corp., as the proposed acquisition of Arrow by Fine Corp. will have no effect on the U.S.-bilateral situation and, hence, the ability of other carriers to provide service to Colombia.

⁴ We received no other answers to the joint applicants' March 4 exemption application. Also on March 11, identical filings were made by Gemini in Docket OST-99-5140, the joint applicants' *de facto* transfer application, and Docket OST-97-2162, the application of Fine Air for renewal of exemption authority to Colombia.

⁵ Gemini notes that this denial is apparently related to a dispute between the governments of the U.S. and Venezuela with respect to the FAA's classification of Venezuela's regulatory oversight of aviation as unsatisfactory.

The joint applicants agree with Gemini that Ecuador is a frequency-constrained market, but note that there are fifteen frequencies allocated in the market, rather than eleven as Gemini represented, and that Challenge Air holds seven of the fifteen frequencies. Therefore, the joint applicants argue that combining the five frequencies held by Fine Air and Arrow would not result in an undue aggregation in this market.

As to the ability of U.S. carriers to serve Venezuela, the joint applicants do not dispute that the FAA's Category 2 designation for Venezuela has indeed been problematic. However, they do not believe that Gemini's suggestion that the Department transfer either Fine Air's or Arrow's route authority to another carrier would do anything to improve the bilateral situation, or Gemini's ability to obtain authority from the Venezuelan government to operate charters to that country.

On March 26, Gemini filed a Motion for Leave to File an Otherwise Unauthorized Document and Consolidated Surreply to the joint applicants' exemption request as well as to the *de facto* transfer application in OST-99-5140, and to Fine Air's request for renewal of exemption authority in OST-97-2162.⁶ Gemini reiterates its argument that the Department should not approve these applications until it determines that such approval will not prejudice the ability of any U.S. air carrier to operate to each of the countries where Fine Air and Arrow hold overlapping authority.

Decision

We have carefully reviewed the arguments made by Gemini in its answer, particularly with respect to issues raised by the proposed *de facto* transfer of Arrow's authority to serve Colombia, Ecuador, and Venezuela. Nothing in Gemini's arguments has convinced us that our grant of the instant exemption request would cause irreversible harm to Gemini or any other U.S. air carrier. Therefore, we will grant the applicants' request for an exemption from the provisions of section 41105 until we have ruled on the underlying *de facto* transfer request. Our grant of this exemption is, however, subject to the condition that Fine Air and Arrow will remain separate and independently operated corporations until such a ruling has been made.

As we have previously held,⁷ requiring the postponement of market transactions until the applicable regulatory process has been completed is not necessarily in the public interest and can be unjustly punitive. Moreover, consummation of Fine Corp.'s purchase of Arrow is at the company's own risk and our approval of this exemption should not be taken as evidence that the Department is prepared to grant the *de facto* transfer application (Docket OST-99-5140) in whole or in part. Prior to granting any portion of that application, the Department will evaluate the competitive issues raised by the operations of Fine Air and Arrow under common ownership and, if appropriate, institute action to reallocate limited-entry route authority or frequencies to other unrelated carriers. However, as long as Fine Air and Arrow remain separate entities, as is the applicants' intent, Fine Corp. could divest itself of Arrow should we disapprove any portion of the proposed transfer. In these circumstances, permitting the applicants to close on the acquisition pending a ruling on the *de facto* transfer will enable them to proceed with their merger plans yet avoids an irreversible situation.

⁶ We will grant the motion.

⁷ See Order 89-1-60, p. 4.

ACCORDINGLY,

1. We exempt Fine Air Services Corp. and Arrow Air, Inc., from the provisions of section 41105 of the Statute, subject to the condition that Arrow Air, Inc., shall be maintained and operated as a separate corporation.
2. This authority shall be effective until 90 days after the Department issues its final order on the joint application of Fine Air Services Corp. and Arrow Air, Inc., in Docket OST-99-5140 for approval of a transfer of route authority under section 41105 of the Statute.
3. We may amend, modify, or revoke this order at any time and without hearing.
4. We grant the motion of Gemini Air Cargo, Inc., to file an otherwise authorized document in this proceeding.
5. We will serve a copy of this order on the persons listed in Attachment A.

By:

A. BRADLEY MIMS
Acting Assistant Secretary for
Aviation and International Affairs

(SEAL)

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